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No. 04-854

Supreme Court, U.S.
FILED
APR 28 2005
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IN THE

Supreme Court of the United States

WILLIAM ETHRIDGE HILL, JR.,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Judicial District

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BRIEF IN OPPOSITION

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The central question presented is whether a written warning and advisement of rights, administered prior to Hill's signing his written confession, when coupled with the earlier incomplete oral recitation of *Miranda* rights, "effectively comply with *Miranda's* constitutional requirement" that a confession be voluntarily given. The answer is "yes" because the earlier recitation of *Miranda* rights to Hill focused his attention on the gravity of his situation and the significance of any statements he might make. That the earlier recitation, standing alone, would be insufficient to pass *Miranda's* bright-line rule determining admissibility of custodial statements is not relevant to the narrower issue before the Court.

The record in the present case establishes the correctness of this proposition and demonstrates that Hill possessed a keen

awareness of the legal consequences of talking with police officers. Evidence that Hill understood his legal position is manifested in the fact that after he orally received *Miranda* rights he steadfastly denied, for over two hours, that he was present at the decedent's home the night of the crime.

While the good or bad faith of police officers who fail to fully advise a suspect of constitutional rights is, theoretically, divorced from whether subsequent *Miranda* admonitions are effective in apprising the suspect of his constitutional rights, bad faith violations call for broader application of the Fifth Amendment exclusionary rule. Hill's insinuation that Gilcrest, in his oral admonishment, intentionally omitted one component in order to obtain a confession does not withstand objective analysis. If Detective Gilcrest had intended to lead Hill astray regarding his *Miranda* rights, he would not have advised Hill of the continuing right to remain silent, to terminate the interview, and to the assistance of counsel. These rights are the backbone of *Miranda*, and serve to focus a suspect's decision-making regarding the degree to which he reveals information to authorities.

STATE'S REPLY

Since Detective Gilchrest orally advised Hill of his continuing right to silence under the Fifth Amendment prior to eliciting incriminating admissions, as a matter of law the two-step interrogation technique was not used. Therefore, *Missouri v. Seibert* does not apply to the present case. Further, the subsequent written warnings effectively conveyed Hill's right to remain silent.

A. *Miranda* warnings were effective as a matter of law.

The complete administration of *Miranda* admonitions has become the *sine qua non* of voluntariness review, dispensing with analysis of the actual state of mind of the confessing

individual. Part of the reason for this is the sheer ease of application of this rule. For all practical purposes, warned statements are admissible and unwarned ones are not, regardless of the actual degree of self-determination possessed by the suspect.

This bright-line simplicity was challenged in *Oregon v. Elstad*, 470 U.S. 298 (1985), but the Court rejected that challenge. This Court held that a properly admonished confession satisfied *Miranda* even though it followed a custodial admission made without the benefit of *Miranda* admonitions, as long as the prior unwarned admission was voluntarily made. The Court reasoned that a suspect should not be deemed incapable of voluntarily admitting to a crime due to a prior fortuitous failure by the police to administer *Miranda* warnings. The Court thereby shunned adopting an abstract psychological paradigm (cat-out-of-the-bag) under which free will is crushed by the weight of the past, while at the same time warning that intentional manipulation of this psychological phenomenon would "distort the reasoning and holding" of the decision. *Elstad*, at U.S. 318.

Missouri v. Seibert presented the opportunity to address the manipulation of *Miranda* warnings. *Missouri v. Seibert*, 124 S.Ct. 2601 (2004). In *Seibert* police officers intentionally conducted an unwarned custodial interrogation of the suspect until she confessed, then administered warnings, anticipating that she would continue making admissions, which she did. The plurality opinion in effect held that this two-step interview technique results in an involuntary confession when the warned portion is too closely associated with the prior unwarned part. Thus, the plurality opinion revived the cat-out-of-the-bag theory in cases where the psychological burden of an unwarned custodial confession is perceived to exert an insurmountable degree of control over a suspect's free will. The Court phrased this issue as "whether it would be reasonable to find that in these circumstances the warnings

could function 'effectively' as *Miranda* requires;" in other words, whether the warnings conveyed the idea that the suspect could make an "informed choice" about talking with police. *Seibert*, at S.Ct. 2610.

The opinion then set forth several factors that determine whether the psychological burden of admitting criminal behavior without *Miranda* admonitions carries over to the second, warned phase of the interview to such an extent that the lack of warnings creates what amounts to a presumption of involuntariness regarding the properly warned admissions. These indicia of involuntariness include 1) the detail of the questions and answers in the first round of interrogation, 2) the overlapping content of the two statements, 3) the timing and setting of the two phases of questioning, 4) continuity of police personnel, and 5) the degree to which the second round of questioning was treated as continuous with the first round. *See Seibert*, at 2612.

The Court induced these factors primarily by contrasting the facts with those presented in *Oregon v. Elstad*. Both *Seibert* and *Elstad* dealt with situations in which police obtained incriminating statements from custodial questioning of the suspects prior to administering *Miranda* warnings and then obtaining full confessions. In *Elstad* the Court found that the unwarned custodial admission made to police in the living room of the suspect's home bore no legally significant relationship to the subsequent station-house confession. In *Seibert*, however, this Court last year found that the vivid contrast with *Elstad* in the above-enumerated areas showed that Seibert's extensive unwarned custodial statement created doubt that subsequent *Miranda* warnings effectively notified her of a meaningful choice between remaining quiet or continuing to talk with police.

Petitioner William Ethridge Hill claims that this very phenomenon infected his interview with police, and then proceeds to apply the above five factors to what he describes

as the two "rounds" of questioning to which police subjected him. Hill argues that the first round consists of approximately four and one half hours of questioning, with the second round consisting of the written administration of *Miranda* warnings followed by about twenty minutes of clarifying the typed statement. Application of the above factors to these two "rounds" of questioning would indeed lead one to conclude that the written *Miranda* warnings were ineffective. The problem with Hill's use of these factors is that they are not relevant to resolution of the issue presented by this case. Because the complete *Miranda* admonishment was preceded by an explanation of Hill's right to silence, the complete admonishment was effective as a matter of law.

Hill's argument before this Court rests on his underlying assumption that a legally incomplete prior recitation of *Miranda* admonitions is equivalent to their complete omission. It is true that, had the trial court admitted into evidence Hill's oral custodial statements made after the incomplete recitation, admissibility would have been determined *as if* all admonitions had been omitted. This is because *Miranda* makes it clear that all admonitions are required to offset the potential coercive effects of custodial interrogation. But, when the issue is the effectiveness of properly administered subsequent admonitions, the function of prior admonitions changes in nature. The prior warnings need not be sufficient to defeat the legal fiction of presumed involuntariness in order to be significant. Rather, the prior warnings need only serve as a catalyst for both the suspect's appreciation of his current situation and the subsequent understanding of the later warnings. This concept of a suspect's actual appreciation of his rights, or more correctly, a reasonable person in the suspect's shoes appreciation of his rights, forms the foundation of *Missouri v. Seibert*, and distinguishes its holding from *Miranda*.

The *Miranda* Court specifically eschewed analysis of whether a suspect in fact knew his rights because it considered such analysis to be rife with speculation: "(W)e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda v. Arizona*, 384 U.S. 436 (1966), at 468. The danger was that a waiver of rights was "obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege." *Miranda*, at 491. The Court has continued with this doctrine even though "(t)he disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson v. United States*, 530 U.S. 428 (2000), at 444.

When the question becomes, however, the *effectiveness* of *Miranda* warnings, the suspect's appreciation of his rights is of paramount importance. This proposition is, *sub silencio*, the significant tenet of *Seibert*, for the crux of the plurality opinion is its derivation of factors that indicate how a "reasonable" suspect would have interpreted the experience of receiving warnings. The plurality opinion ends by noting that "the facts here do not reasonably support a conclusion that the warnings given could have served their purpose," a conclusion that immediately came on the heels of the following observation:

> It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk. *Seibert*, at S.Ct. 2613.

In the context of the present case, the critical issue becomes whether a "reasonable person" in Hill's shoes would have understood that he had a real choice regarding signing the typewritten confession. Addressing this issue correctly calls for the circumstances surrounding Hill's interview with police to be projected onto this reasonable person. In *Seibert* this Court used unique facts about the suspect and her interaction with police to show that the *Miranda* warnings were ineffective. Use of the reasonable person standard shows that the Court's goal was to determine, as nearly as possible, the conclusions reached by the suspect on the critical issues.[1]

The Court noted, for example, that she was awakened by police while staying with her son in the hospital and arrested at 3 a.m. before being taken to the police station where she was questioned without benefit of *Miranda* warnings. The Court then pointed to circumstances surrounding the suspect's interview with police, and to specific comments made during that interview, that buttressed its conclusion that

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[1] The Third Circuit Court of Appeals has observed that a suspect's actual awareness of his legal rights is sometimes relevant:

> "We do not intimate that a defendant's subjective understanding of his or her rights controls the question of whether the warnings, as given, were misleading. Nonetheless, whether a defendant understood his rights is arguably relevant when a court is trying to determine whether plausibly equivalent warnings sufficiently convey notice of the fifth amendment rights protected in Miranda. The Court has made clear that the exact Miranda words are not necessary, but unless Miranda is overturned, something essentially equivalent to the familiar Miranda recitation must be conveyed to the suspect. In determining whether it is equivalent, we believe that a suspect's subjective opinion of what those words meant may sometimes be relevant."

United States v. Cruz, 910 F.2d 1072, fn 5 (3d Cir. 1990).

the suspect did not, in fact, have a "real choice" regarding the exercise of her rights once she was finally warned. *Seibert*, at 2610.

The State believes that the Court should likewise pay particular attention to the facts surrounding Hill's encounter with police, including comments made both before and after he received his written warnings. Not only are comments of the police relevant, but the State believes that all of Hill's statements are relevant to determining the effectiveness of the subsequent warnings.

The pivotal difference between *Seibert* and the present case is that Detective Gilchrest, when the interview became focused on Hill's whereabouts the night of the offense, advised Hill of his *rights* as interpreted in *Miranda*. As Gilchrest testified at pretrial, he forgot to carry *Miranda* "blue cards" with him, and he told Hill to listen, as he was going to "ramble" through the warnings. Hill now insinuates that this was part of some master plan of deception on Gilchrest's part, but the record, and common sense, do not support such a suggestion. As the following excerpt shows, Gilchrest twice told Hill of his right to remain silent, the second time specifically saying that "(y)ou don't have to talk to me now or at any time during the interview, okay?"

[44] MR. GILCREST (sic): Well, hey, you know, it's a tough job, but somebody has got to do it. Before we get into any specific questions, I need to make sure that you—you understand some things, okay? You know that you—like I said before, you don't have to be here talking to me.

THE WITNESS: Right.

MR. GILCREST: Okay. I'm going to tell you what your rights are.

THE WITNESS: Okay.

MR. GILCREST: You're not being arrested for this, okay?

THE WITNESS: Okay.

MR. GILCREST: But by the laws—I don't know how they are in here in Maryland, but by Texas law—and I'm sure it's the same all over—when I get into specifics with you, under these circumstances, I need to advise you of your rights, okay?

THE WITNESS: Right.

MR. GILCREST: If there's any of these things that you don't understand, tell me, and I'll try to explain them. They're pretty self-explanatory. Most of it you've heard on TV [45] shows.

THE WITNESS: And spent the most part of my life watching them. I didn't watch the news too much. I had recently had some really awful experiences with the APD. Like I said, my house gets robbed a year ago. I called in all the serial numbers. The police report comes back with no serial numbers.

MR. GILCREST: Okay.

THE WITNESS: I'm car-jacked in front of the police substation during that little (indistinguishable) (18:10:52) we had.

MR. GILCREST: Uh-huh. Uh-huh.

THE WITNESS: Get my face caved in. That guy breaks my windshield, which is why my old car is parked at Dan's.

MR. GILCREST: Right.

THE WITNESS: Well, actually, it was a wreck that caused that, but I had just gotten it fixed from the car-jacking. And I was about to re-license—it was my mother's car.

MR. GILCREST: Uh-huh.

THE WITNESS: I was going to re-license it in Texas. But I—you know, I had two guys that were basically copycats. I made a police report that [46] I—it happened at a police substation over by my house.

MR. GILCREST: Uh-huh.

THE WITNESS: And, you know, I swoll up like a whatever, and by the next Monday there was no record in the

computer. Dan went out of his way to try to—I ended up getting a new windshield for $150, which was a miracle. And then earlier this year I had a public intoxication charge, and they wouldn't—I couldn't even beg my way through a breathalizer. She said my eyes looked funny, and I was slurring my words, which I do because I'm missing two teeth, and I smelled of alcohol, which I had gone to the restaurant, fixed the sound system problem, laid in the floor, and it was in my clothing, but I begged for a test, and I showed the medical records. I had been bitten over the eye by a spider four days before, and I had been on antibiotics, and my eyes did look funny. In fact, when she looked a little closer, they looked horrible. But, you know, I never knew that you couldn't request—because I wasn't causing trouble.

MR. GILCREST: Uh-huh.

THE WITNESS: I was sitting—there [47] were actually—had someone else surrounded with four police cars. I was sitting there, and this rather large policewoman's rear was right in my face. And I finally said, Excuse me, ma'am, I just want you to know, the back of your—because I couldn't leave.

MR. GILCREST: Uh-huh.

THE WITNESS: And she turned around and shines the light in my eyes, and the next thing I know, I'm going downtown. And I get—you know, I got out at 7:00 the next morning. And even the nurse that examined me gave me my medication—

MR. GILCREST: Uh-huh.

THE WITNESS: —and everything, and I couldn't get any—so that and then the old check thing that you know about.

MR. GILCREST: Yeah.

THE WITNESS: And it's like between all those things and a car wreck, I eventually worked my way—paid things, worked everything out, and then left to see my mom, and I

was—I missed that flight by three minutes like I missed that first train by three minutes today.

MR. GILCREST: Okay. You're a three-minute kind of guy.

[48] THE WITNESS: I never have been before, but. . . And it took me two hours, like I said, to rebook it, so—

MR. GILCREST: All right.

THE WITNESS: —let's go ahead. So tell me what you need to know.

MR. GILCREST: Yeah. Just listen to this. Let me ramble through it if I could get my—my brain to work here. You have the right to have an attorney present prior to and during any question. You have the right to refuse to answer any question, okay? You have the right to consult an attorney anytime during the interview. You have the right to terminate the interview at any time, okay? Do you understand that all that so far?

THE WITNESS: Right.

MR. GILCREST: If you can't afford an attorney, you have the right to have one appointed to represent you prior to and during any questioning. Do you understand that?

THE WITNESS: Yes, sir.

MR. GILCREST: Okay. You have the right, as I said, to terminate this interview. You don't have to talk to me now or at any time during [49] the interview, okay?

THE WITNESS: Okay.

Transcript-44-49.

Even *Miranda*, while voicing the importance of each warning, made clear that the right to silence was the definitive Fifth Amendment right, which the other warnings served to support. The Court recognized that alternatives might exist, as long as they were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, at U.S. 467. In this Court's most recent significant *Miranda*

decision prior to *Seibert*, the Court reaffirmed that "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson v. U.S.*, at U.S. 442.

Detective Gilchrest did in fact advise Hill of all his Fifth Amendment *rights*. As the Court noted in *Dickerson*, the *Miranda* warnings "have come to be known colloquially as '*Miranda* rights.'" *Dickerson*, at U.S. 435. Indeed, the colloquial term seems more apt than the formal term, for there is only one actual warning among them. Even police officers, or *especially* police officers, would tend to gravitate toward the colloquial phraseology. Gilchrest's liability was that he spoke as a common man.

Gilchrest's strength lay in the fact that he was experienced enough, and conscientious enough, to interrupt his questioning of Hill so that he could administer *Miranda* warnings early on, before a question of custody arose. A person is in custody only if a reasonable person would think that his freedom of movement is restrained to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318 (1994). Moreover, the subjective intent of a police officer is irrelevant unless that intent is in some way communicated to the suspect. *Id.* The fact that Gilchrest had an arrest warrant on Hill for credit card abuse but did not immediately inform him is irrelevant to the custody issue. Hill argues that this makes his case of trickery against Gilchrest. To the contrary, this is just good police work. If Gilchrest wanted to trick Hill, he would not have emphasized that Hill did not "have to talk to me now or at any time during the interview," at precisely the point when incriminating information might begin to come out. Transcript- 48.

Regardless of this everyday policeman's faults, the fact of the matter is that early on he, in unmistakable terms, focused Hill on the adversarial nature of the relationship between

himself and Hill. The State submits that Hill unquestionably knew his legal footing from this moment onward. Would he have thought that his statements were nothing more than insignificant chatter in the interview room? Hill was aware that he could get in trouble by what he said, as is the typical 5th grader sent to the principal's office. Indeed, the State submits that virtually any ordinary adult has the impression that admissions made to police after being advised of legal rights will be available as evidence against him in court.

The State understands and accepts *Miranda's* mandate for clarity in the custodial setting. The defect in Gilchrest's admonitions precluded admission into evidence of Hill's custodial oral statements made thereafter. The trial court so held. But the issue before this Court is the effectiveness of the subsequent written warnings, in light of Hill's earlier expressed understanding of his rights. "Where the initial violation of Miranda was not part of a deliberate strategy to undermine the warnings, Elstad appears to have survived Seibert." *United States v. Stewart*, 388 F.3d 1079, 1092 (7th Cir., 2004). It seems to the State that extension of the *Seibert* doctrine to the facts of this case would undermine the very principle upon which *Seibert* was based, namely, that a suspect's awareness that he has meaningful choices when talking with police is the heart of the Fifth Amendment.

B. A reasonable person in Hill's shoes would have understood that he had a meaningful choice regarding the exercise of his Fifth Amendment rights.

While determining a suspect's actual knowledge of his rights might be too burdensome in the first instance, when the question is the effectiveness of a subsequent complete set of admonitions, the suspect's actual knowledge is important, for this is part of what comprises the "reasonable person" in the suspect's shoes. This must be ascertained from the circum-

stances surrounding the reception of warnings, and from the reasonable perceptions of the recipient.

This subjectivity makes sense in Hill's case, where questioning occurred before full admonishment. When evaluating the admissibility of statements made after an incomplete admonishment, precedent requires that we ignore the degree of understanding a suspect has of his rights. It is necessary, indeed proper, that we indulge legal fictions in order to ensure that fundamental rights are not compromised. This does not mean, however, that we are thereby rendered forever blind. When the question becomes whether a subsequent warning conveyed its meaning, then the likely effect of an earlier partial warning is significant, and this need not be determined in a vacuum. The surrounding circumstances give life to what would otherwise be abstractions.

Things said indicate the conclusions that are being drawn, and the Court in *Seibert* relied on conclusions assumed to have been drawn by the suspect, particularly regarding her right to remain silent. The Court concluded that Seibert would not have realized that she had a real choice whether to admit her role in the crime. This likely conclusion was necessarily dependent upon her knowledge and experience in relation to the circumstances surrounding her custodial interview. The only way to conceptualize the possible conclusions drawn by a suspect is to deduce them through use of the imagined reasonable person who stood in her shoes.

In the present case, since Hill was unquestionably apprised of his Fifth Amendment right to silence early on during the interview, his complaint must necessarily be confined to his suggestion that he had no awareness of the potential consequences of talking to police. Perhaps the soundest rebuttal to this suggestion is the fact that, for the first two-thirds of the interview, Hill doggedly maintained that he did not visit the deceased the night of the crime, even while Gilchrest was telling him that a neighbor saw him park his car and approach

the deceased's home at 3 a.m. It strains reason to think that Hill was holding back on the truth simply to play hide and seek. Hill stuck to his story until he became convinced that the detectives were not falling for it, and that time was running out. Hill finally gave in, admitting that he went to visit the deceased the night of his death: "Okay. You get it. I did go over there, okay?" Trans.- 168.[2] Coming from

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[2] This admission was made less than five minutes after Gilchrest, in exasperation, told Hill he was being placed under arrest on the credit card abuse warrant, and was going to jail. Then Roach surmised that Hill and the victim fought after the victim found Hill going through his wallet, which Hill vehemently denied. Gilchrest finally implored Hill to just admit he really did go to the deceased's house, without saying what happened inside. Trans. 164.

The officers knew Hill wanted to see his mother, and told Hill that his mother would want him to tell the truth. It is true that the officers played on Hill's wish to spend time with his mother. A wish on Hill's part, however, does not amount to a promise on Gilchrest's part. Gilchrest's statement was too ambiguous to qualify as an unlawful inducement. "The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible . . . the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits not exceeded here." *United States v. Rutledge*, 900 F.2d 1127 (7th Cir., 1990). Also, see *United States v. Ferrara*, 377 F.2d 16 (2d Cir., 1967) (holding federal agent's statement that cooperation would enable suspect to get out on reduced bond did not render confession involuntary); *State v. Churchill*, 231 Kan. 408, (Kan., 1982) (discussing rule that a confession induced by the promise of a collateral benefit, i.e., no benefit to the suspect with respect to the crime under inquiry, is generally considered voluntary). According to *Oregon v. Elstad*, a subsequent properly warned statement is admissible as long as the prior statement was voluntary, i.e., it did not result from "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will." *Id.*, at 309. Hill's earlier statements were voluntary.

Hill in effect conceded this point when he did not argue in his petition for review to the Texas Court of Criminal Appeals that prior admissions

someone who had experience dealing with police, this shows that Hill knew the game was over.

The State believes these circumstances from the first portion of the interview are relevant because of the nature of the inquiry, namely, the effectiveness of the later warnings. The most important circumstances relevant to this inquiry, however, are the circumstances surrounding those later warnings. The attached appendix contains Hill's interview from the point at which Gilchrest retrieved his laptop so that he could prepare the written statement. See Transcript- 205-246.

The first ten to fifteen minutes were spent discussing the chances of Hill making bond the following day. Then about thirty minutes were spent going over what Hill had to say about the night of the crime, before Gilchrest left to print the statement. When he returned, Gilchrest gave the printed copy to Hill and told him to read it "from the very top." Thereafter Hill began talking about his use of the victim's nickname during the first part of the statement, but Gilchrest interrupted and asked Hill specifically if he had read all the warnings. Trans.- 234. Hill replied that he had, and then agreed that they were "(t)he same thing I told you before."

Hill now argues that this interchange is further proof of Gilchrest's trickery. His argument seems to be that having Hill read the warnings for himself was a ploy to get Hill to skip over the warning of adversarial consequences. This

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were involuntary because of an unlawful inducement. He has therefore procedurally defaulted further complaint on that issue.

The attached appendix contains the conversation between Hill and the officers after Hill's oral confession. Hill asked several questions related to his chances of making bond so that he could visit his mother before returning to Texas. Gilchrest told him that was unlikely. Trans.- 212. The transcript supports the State's position that the officers did not make even an implied promise to Hill.

argument is far too speculative, and is an unfair portrayal of Gilchrest. Gilchrest not only permitted, he encouraged Hill to call his mother before getting down to the business of preparing the written statement. Trans. -209. The effect of this action should come within Justice Kennedy's notion of "curative steps," even though this is not a case of intentional omission. *Seibert*, at 2616.

There is no reason to believe that Gilchrest's directive to read and understand the warnings is anything other than an attempt to focus importance on them. Gilchrest was attempting to ensure that Hill fully understood the warnings. The State submits that the most cogent interpretation of this interchange is that Hill was agreeing that he fully understood any statements made could be used against him in court, and was aware that he had a meaningful choice whether to continue.

A written waiver of rights accompanying a signed, written, confession adds a dimension to the analysis not present in *Seibert*. The formality of a written statement severs it from the prior interview, diminishing the significance of *Seibert's* observation that the suspect would view the interview as continuous. Hill obviously attached great significance to the written statement, as shown by his almost obsessive attention to detail.

The transcript speaks for itself. We do not know whether Hill's acknowledgment of adversarial consequences means that he had, all along, assumed this notion applied to the entire interview (because he 'heard it' as Gilchrest was reciting his rights), or whether he was simply acknowledging his understanding that it applied to the written statement. Because the importance of the written statement to police was obvious, either of these reasonable interpretations of Hill's "Uh-huh" supports the State's conclusion that the written admonishment was effective in conveying a real choice. On the other hand, Hill's implied argument that this response is a signal that he signed the statement out of confusion over the

exercise of his Fifth Amendment rights seems to push the limits of reason.

Based upon common sense, knowledge, experience, and Gilchrest's prior admonishment, the State submits that Hill was fully cognizant of the importance of the written statement. As Hill examined the written statement he began explaining several points in slightly different terms, but was uncertain how to phrase them. The following responses by Gilchrest stand out:[3]

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[3] p. 233

Gilcrest: Okay. Let me go print this up, let you read it, make sure that's what you want to say. We're pretty close to being done. I'll be right back.

(Brief Recess)

Gilcrest: I want you to read this . . . If there's anything in here that is not true or not correct or I put it down wrong, tell me and we'll change it, okay? Read it from the very top, okay?

Hill: Do you see one thing? I called him Bill more often than I called him Cato. That was an occasional . . .

p. 234

Gilcrest: Okay. Well—

Hill: When I was around people that called him Cato, I called him Cato. When I was around people that called him Bill, I called him Bill.

Gilcrest: And I changed it about halfway through and started calling him Bill also, as you did.

Did you start from the top?

Hill: Uh-huh.

Gilcrest: Okay. You read all these warnings?

Hill: Uh-huh.

Gilcrest: The same thing I told you before?

Hill: Uh-huh.

Gilcrest: All right. Don't (inaudible) me off for spelling or anything.

Is there something there you don't understand?

Hill: No.

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Hill: You know, I don't know if that should be on there or not.

Gilcrest: It's your statement. You tell me what you want on there.

Hill: Okay. I wanted to add Bill was acting – and that I didn't go over there intending to harm Bill. And, actually, it was a protective reflex. I don't know how to say that without sounding stupid.

Gilcrest: That's the way I'll put it if that's what you want to do.

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Gilcrest: So you want to add at the bottom it was—

Hill: It was—it was a—

Gilcrest: It was a self-protective reflex?

Hill: Yes. It was a – I don't know. If somebody comes at you, what do you do?

Gilcrest: Probably the same thing.

Hill: I don't know—I don't think that's necessary, but…

Gilcrest: I'll just add, "I took the keys when I left. I drove Bill's truck down the street and parked it, as I've done before."

Hill: Yeah, because if you – you know, if –

Gilcrest: Is that what you want to say?

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Hill: Not really. I don't know.

Gilcrest: Is this okay this way, or do you want to add something?

Gilcrest: Okay. Let me go – let me go add this part here and get this "the" out—

Hill: Okay.

Gilcrest: —on this page.

—It's your statement. You tell me what you want on there. Trans. 236.

—That's the way I'll put it if that's what you want to do. Trans. 236

—So you want to add at the bottom it was -- Trans. 237

—Is that what you want to say? Trans. 237

Before leaving to print another copy with the changes, Gilchrest told Hill:

"While I'm doing that, Texas rules say that I have to have two non-police witnesses to do this. They're not in here to talk to you or anything else. They're just going to witness you sign this statement, okay? You can do

---

While I'm doing that, Texas rules say that I have to have two non-police witnesses to do this. They're not in here to talk to you or anything else. They're just going to witness you sign this statement, okay? You can do that on these two pages, and I'll go change this, okay?

Hill: All right.

Roach: Jane, Allen, why don't you come on in. You just have to witness him sign this.

(Female speaker):Okay.

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Gilcrest: Just put the date and time below the signatures.

Hill: Yeah. He—I don't know if that should be—do you think I should change that, because he was?

Gilcrest: Don't ask me what I think. It's your statement, okay? If you want me to scratch it out, we'll just put a line through it, and let you initial it and just scratch out that word.

Hill: Yeah.

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Gilcrest: What I want you to do is while these folks are watching, I want you to initial out beside this line for this scratch out.

Hill: Okay.

that on these two pages, and I'll go change this, okay?" Trans. 238.

Hill knew that this was his official version of what happened, and he worked to make it as correct as possible. Without question Hill knew that he was about to sign his name to a formal legal document that could be used as evidence against him. He also knew that the rules surrounding this document were strict, and that the police were very focused on it. There is no reason to think that Hill had forgotten Gilchrest's earlier advice that he had a continuing right to silence or to terminate the interview. From these circumstances it seems safe to conclude that Hill was aware he could choose to sign the document, or refuse to sign it, and he would have logically concluded that refusing to sign the statement would deprive the police of something that they wanted, i.e., evidence. Hill did not know the interview was being recorded, so, in light of the focus on the written statement, would not have been likely to believe, at this point, that his earlier oral statements were of interest to police.

Hill's argument must necessarily rest on the following propositions:

1) The oral admonishment deceived him into believing that what he said could not be used against him (in spite of the detailed recitation of rights),

2) Then the written admonishment told him that what he had said could in fact be used against him (except not in the written statement unless he signed it),

3) Since he now felt trapped because he had earlier spilled the beans he agreed to sign it, even though he was fully aware that (a) he did not have to sign the written statement, (b) it required multiple witnesses and special rules, and (c) the police were now very interested in him signing it,

4) And, finally, Gilchrest planned the whole scheme to work out this way.

While almost anything may be theoretically possible, the State respectfully submits that application of these propositions to the facts of the present case creates an extremely unlikely scenario. In the language of *Seibert,* a reasonable person in Hill's shoes would have realized he had a meaningful choice. Extension of *Seibert* to this set of facts would have the effect of fully rejuvenating the discredited cat-out-of-the-bag theory. While few conclusions are crystal clear when employing the reasonable person standard, the State nevertheless submits that the foregoing conclusion is firmly grounded.

CONCLUSION

Elstad v. Oregon held that a confession obtained after proper *Miranda* admonishments is admissible, even if custodial interrogation occurred prior to admonishment, as long as the initial questioning was otherwise voluntary. The only exception on which a majority of the Justices agree is when investigators employ a two-step interview technique where *Miranda* warnings are deliberately withheld to facilitate obtaining unwarned incriminating information prior to formal admonishment.

The rationale of *Seibert v. Missouri,* as a matter of law, does not apply to the present case. Detective Gilchrest, from memory, advised Hill of his Fifth Amendment *rights*, including the continuing right of silence, at a point in the interview before incriminating evidence was likely to surface. He left out the warning that any statement may have adversarial consequences, but quite firmly focused Hill on his right to silence, in a manner likely to impress upon any typical adult the inevitable conclusion that any statements made could be used as evidence against him.

Seibert stands for the proposition that, when warnings are not administered at the beginning of custodial interrogation, courts will look at the surrounding circumstances to determine whether the warnings were effective in communicating to a reasonable person in the suspect's shoes that he had a real choice whether to exercise his Fifth Amendment right to silence. The surrounding circumstances include a suspect's knowledge and experience, along with conclusions drawn from comments made by both the suspect and investigators during the course of the entire interview.

Hill's argument must necessarily be confined to the proposition that the inadvertent omission of the warning of adversarial consequences during a prior admonishment, before incriminating evidence surfaced, so contaminated the interview process that the subsequent complete administration of written admonishments could not effectively convey to him that he had a real choice whether to exercise his right not to incriminate himself. The fact that Hill was actively engaged in the process of revising his written statement, indicating a desire on his part to make his version of events known, combined with the formality of signing the statement, i.e., that it be witnessed by two non-police personnel and that strict Texas rules governed its legitimacy, all lead to the conclusion that Hill consciously and freely gave up his right to remain silent.

Therefore, this Court need not wonder whether further *Seibert* proceedings in the Texas appellate courts would be of any benefit. There are no issues needing resolution prior to this Court's determination that the present case is governed by *Oregon v. Elstad*. The petition for writ of certiorari should be denied.

PRAYER

WHEREFORE, premises considered, the State of Texas prays that this Court deny Hill's petition for writ of certiorari to the Texas Court of Appeals, Third Judicial District.

Respectfully submitted,

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APPENDIX

APPENDIX A

Transcript of Videotaped Statement of William E. Hill,
pages 205 through 247

[205] MR. GILCREST: Okay. Let's take a little break here, and I'm going to go get my laptop, and we're going to go back over just the part of what happened when you went over there.

THE WITNESS: Okay.

MR. GILCREST: Why you went over there and what happened when you went over there. And let me type it up and get it on paper, and then we're going to quit for the night.

THE WITNESS: Well, am I going to have to stay in jail, or can I go to my mother's?

MR. GILCREST: Well, let me—let's finish up here, and we'll discuss that, okay?

THE WITNESS: I'm not running from [206] here.

MR. GILCREST: No. Let me—this is not my state. I have no control here, you know. I don't know what their laws are. I don't know what—you know, the federal people are involved. I don't know what their role in this is. But probably what's going to happen, we're going to have to deal with the laws of the state of Maryland. That's usually the way it goes. But that's something we're going to—we're going to figure out before we leave. Let's get this part taken care of. Oh, man. I have to tell you. You—you wore me out.

THE WITNESS: Man, I'm sorry.

MR. ROACH: What do you think? You feel better? You feel better?

THE WITNESS: Yeah.

MR. ROACH: I told you you would. We're going to put this on paper and get him to bed.

THE WITNESS: Is there any possibility I could spend the night with my mother?

MR. ROACH: The papers are—the papers are down there in Texas. We can't do that. You can call her and talk to her, and maybe we'll get you out tomorrow. No, you've got to be booked and processed and go in there. Just tell her—

[207] MR. GILCREST: On the—

THE WITNESS: What? What?

MR. GILCREST: On the credit card use. I don't know what the deal is with the extradition and all that stuff, but it's—it's kind of a complicated deal, but let's get this on paper, and then we'll find out all the rules and regulations and let you know and let you call your mom, okay?

THE WITNESS: Okay.

MR. ROACH: What were you going to—what did you stand to gain by sitting here lying all night? You know, he's got the case made, and now we're just trying to get you to help yourself. That's a hell of a lot better story than what the jury can figure out on their own.

MR. GILCREST: It's a hard thing, Mr. Roach. It's a hard thing.

MR. ROACH: It is difficult. Well where are you going now?

THE WITNESS: I . . . don't know. I was following you guys. I was following you guys.

MR. GILCREST: Yeah, I'm going to bring my laptop in here, and we're going to—we're going to do the—

MR. ROACH: Are we going to do the [208] indictment or anything?

MR. GILCREST: Yeah. We're just going to try to get it down.

MR. ROACH: We should let him call his mother too, because she'll be in bed.

MR. GILCREST: That's fine. Give her a call and tell her—

THE WITNESS: Okay. Let me ask you this, then. Where do we stand? I need to be able to spend, if possible, some time with her. So are you talking about if I have to spend the night here, if there's a bailing bond, or this, that, and the other?

MR. ROACH: There's always a bond involved.

THE WITNESS: Will I be able to, while I'm still here, without going back to Texas—

MR. ROACH: You're not going back to Texas tonight or tomorrow or the next day. You're going to the County Detention Center a short distance from your mother's house. They'll have a bond hearing probably in the morning. She'll be able to go over there and visit you. Your sister will be able to visit you. It's close proximity to her home. And after the bond hearing, they'll know a lot [209] more.

THE WITNESS: What is the possibility of my being able to go spend time with her?

MR. ROACH: She'll be able to spend time with you at the detention center. If you make bond, you can go right home.

THE WITNESS: Okay.

MR. ROACH: Okay.

THE WITNESS: I was just asking what are the odds of me making bond?

MR. ROACH: Probably pretty good.

MR. GILCREST: Yeah, I don't see a problem with that.

MR. ROACH: Because of your cooperation and everything, I mean, I don't see a problem. It all depends. We can't speak for that, but, you know, probably pretty good.

THE WITNESS: Because I really need to get over there and spend a little time with her.

MR. GILCREST: Why don't you go ahead and give her a call.

THE WITNESS: Okay.

MR. GILCREST: Where can he use the phone?

(Brief Recess)

[210] (Beginning of Part II)

THE WITNESS: (21:39:07) Well, I know that—

MR. GILCREST: That's hard on her, I know.

THE WITNESS: Well, it's just that I told her, you know, the schedule that we just talked about.

MR. GILCREST: Okay.

THE WITNESS: And, you know, it's—I know that this is really—I know how serious this is, but it's really, really important that—that I get to spend some time with her, and I know you have no power over that or anything like that, but would you honestly tell me, you know, am I being assigned over here without being potentially able to make bond on the other and spend a couple of days with my mom?

MR. GILCREST: Ethridge, I don't want to lie to you, and if I told you I knew the answer to that, I would be lying. I don't know Maryland rules. I don't know McCormick County rules.

THE WITNESS: I mean, he just told me he was reasonably certain there was a bond hearing tomorrow morning, and I would be able—

MR. GILCREST: That bond hearing, [211] that's pretty universal. I mean, you can't be held in jail without having a hearing of some sort if there's a bond set. What it's going to take to get you bonded out, I don't know. I mean, I don't know if you have to come up with the whole amount or part of the amount.

THE WITNESS: Well, we're talking at this point the bond being for the credit card thing?

MR. GILCREST: Right.

THE WITNESS: Where do—

MR. GILCREST: In all honesty—

THE WITNESS: Where do these two overlap?

MR. GILCREST: Well, obviously, what we did here tonight is—I'm going to be on the phone when we finish up and—and talking to my boss and my district attorney and then, you know, we'll know from there. There is a reasonable amount of certainty that there's going to be a charge filed on you anywhere from manslaughter to—to murder, okay? When that gets done is still up in the air. In all probability, though, I mean, it needs to get done before you get out of jail, because although you [212] give me your word that you're not going to run off to Canada or someplace, the district attorney is not going to accept that. So, you know, that's—in all honesty, that's what we're dealing with, and you may have an additional bond to come up with before the bond hearing. You understand what I'm saying?

THE WITNESS: Uh-huh.

MR. GILCREST: Okay. The extradition part of it is a whole nother story, and you'll have to talk to the people in

the jail about that. They'll—they'll know all the rules and regulations. And, you know, the best bet for you to visit with your mom is for her to get over to the jail and you-all visit. It's going to be really tough for you to get back home for a while.

THE WITNESS: Uh-huh.

MR. GILCREST: Okay. And, you know, I'm sorry I can't give you a definite answer on every—

THE WITNESS: I'm basically saying at this point, before I'm sent—

MR. ROACH: You'll make bond on this charge tonight. If they get the other charge up there in time, that will be another bond hearing, and that will either be increased significantly more or [213] be denied, or the judge could release you to the custody of your mother. If she signed over the deed to the house or whatever, and your sister or whatever—you've got a responsible family. You've got roots in the community. I don't think you're a flight risk. I think you'll make bond on the one charge, credit card abuse. Everybody gets out on that. I mean, they don't hold people in jail for that. And—and this other charge, it all depends what the D.A. makes of it, now, and what they charge, so—how much bond is going to be or whatever. You might get released on your own cognizance, released to your mother's custody, you know.

THE WITNESS: Like I say, I have a sister and a brother-in-law here that are both lawyers in Washington, DC, as well—and a prominent family. And that's another reason that—that's you know, I'm the only one that's not—I have—

MR. ROACH: From 24 hours from now, you'll have all the answers, and all the questions will be answered, and your family will know more than we do, because they'll be acting with the attorney and whatever. And it's just a slow process,

and we can't speed it up now. I mean, you've been waiting for this thing to end for quite a while.

[214] THE WITNESS: So you think—so you think there will be a bond hearing tomorrow, though?

MR. ROACH: Yes, there will be for the charge you're being incarcerated on tonight.

THE WITNESS: Right.

MR. ROACH: And you might make it. You might make it before the other law gets here, before they file the detainer, before the authorities in Austin file the detainer, you might make it. And then they'll come out and get you again, and you'll go before the commissioner again and lodge you again on the new one, and you don't want that to happen. You want to do both of them while you're in there. So—

THE WITNESS: Yeah.

MR. ROACH: —just wait it out.

THE WITNESS: Well, my mother doesn't own her house, so she won't be able to mortgage it, because she's leasing it. But I wouldn't want her to do that anyway.

MR. ROACH: There's other people in your family, responsible people with some assets. They can put up a personal recognizance bond or property bond or whatever.

THE WITNESS: Yeah.

[215] MR. ROACH: Surely.

THE WITNESS: I do.

MR. ROACH: Surely. Which means that it doesn't cost them anything, if you keep showing up for all your appearances and going to Texas when they want you to and this, that, and the other. But this has to be resolved, and hiding from it and lying from it and waiting for—waiting for Detective Gilcrest to call you and going to New York, that ain't no

way to live. You didn't want to live like that. You wanted to get it resolved.

MR. GILCREST: Which we did. And it's going to be much better for you.

Q. (By Mr. Gilcrest) What's your birth date?
A. September the 14th, 1949.
Q. 1948?
A. Uh-huh.
Q. Okay. (21:45:32).

THE WITNESS: Thanks, both of you.

MR. ROACH: You're welcome, Ethridge. You struggled with it. You struggled with it. And we thought if we stuck with you long enough, that your own decency would win out.

MR. GILCREST: And it did.

THE WITNESS: It's just that—[216] (inaudible) way I had established is that—you're right. It's probably from blocking it out and—and just (inaudible) about the disappointment and heartache you're going to cause your family and—but . . .

MR. ROACH: Well, pick up the phone and call the EMS and dial 911 right then and there, you wouldn't have a problem.

THE WITNESS: Yeah, I wanted to too.

MR. ROACH: Two—two drunks get to pushing and shoving, and one falls down and hits his head, the one that didn't fall down picks up the phone and calls EMS—

THE WITNESS: I wanted to.

MR. ROACH: —or 911.

THE WITNESS: I said, Bill—

MR. ROACH: You standing there saying that he came at me, I held up my hands and he tripped and fell and hit his head, I'm upset. I called the doctor—

THE WITNESS: —(inaudible) me holding up my hands. I had beer in it, and I turned my shoulder and I—but he got back up.

MR. ROACH: Well, if you had told that story then, if you had told it then, if you had done [217] the right thing—what you did was, you did what everybody does, you got scared—

THE WITNESS: Yeah.

MR. ROACH: —and ran away.

THE WITNESS: I was actually—

MR. ROACH: That just doesn't resolve anything.

THE WITNESS: I actually was more than just scared. I actually got bordered away. I—

MR. GILCREST: (21:47:21) You know, if he was a sober, responsible person, it wouldn't have even happened, but he was not.

THE WITNESS: Well, you're right there. But I—I yelled at him, Bill, we need to call EMS. And he—I got—I know you're right. I'm not—

MR. ROACH: I know I'm right.

Q. (By Mr. Gilcrest) Is Kensington spelled with one "n" or two?

A. K-e-n-s-i-n-g—

MR. ROACH: t-o-n.

THE WITNESS: I had—I didn't—well, like I say, I've been through similar things with him before, but, again, where—I don't know. I had called the house after I got here, when I got the busy signal, to check on him, [218] and—you

know, because it's like when he'd want somebody—well, when he was like that, he gets drunk. Yeah, you're right. It's like I got scared, and I did—basically at that point I just (inaudible). I'm getting like bits and pieces wanting to—a few things coming back to me. You're right. I—I blocked it.

MR. GILCREST: And there's probably more detail that are going to pop into your brain (inaudible).

MR. ROACH: Yeah, you crossed a big hurdle here when you started telling the truth, and you would be well advised to continue telling the truth when you start talking to your attorney; not to change anything, to make things go better. If anything—if anything, you want to tell him even a more complete version than you did us. You see what happens when people don't tell their attorneys the truth? You see what happened to Norte (phonetic) Albert?

THE WITNESS: Yeah, I see. Well—I don't know.

MR. ROACH: Norte (phonetic) Albert [219] didn't get over the hurdle.that you just did. He couldn't tell the truth to himself or to his attorney. And, therefore, when the witnesses took the stand, he looked at his attorney and said, I know this woman is not going to matter. He was still denying. Still denying. And so cowboy cop were just sitting in there, and they don't know (21:50:30).

THE WITNESS: You know, I—I didn't know until Doug called on that obituary that he was dead. I really . . .

Q. (By Mr. Gilcrest) You said you lived with Cato for about a year?

A. Close to it, I guess. It seemed like something like that.

Q. So you actually moved out the Friday—

A. Yeah.

Q. —the Friday before that?

A. I had every intention of being gone. I didn't have any—you know, I was ready to move on in life. I didn't need for Bill to go anywhere.

Q. Did Bill ask you to move, honestly?

A. Yes, and I was—

Q. You were ready to go?

A. It was funny, because I was going to tell him that I—tell him that I should even be out by [220] my birthday, and we talked—we brought the subject up at almost the exact same second, and we laughed about it. It was like, I said—you know, he said, Now that I'm home so much, I just—you know, this house just really isn't big enough for two people. And it's really not. Because he wouldn't—because he likes to pass out in the living room. You can't—you can't come in late at night yourself and have any sort of like—you can't come in and watch a movie, or whatever. You have to go back and hibernate, whatever, because he literally takes up space. And we laughed about that, and he said, Yeah. I said, Well—you know, I told him what my plans were at that point, which were to—I was already beginning to think about the island. And if not the island, come over ere to the east, (inaudible) New York, stay with my sister, and one would have been move here, because all my family is moving to this part of the world, so—and we—our relationship really improved just after we made a decision.

Q. When you talk about the island, you're talking about Padre Island, then?

A. Uh-huh. South Padre as opposed to [221] Corpus Christi.

Q. Your original flight was scheduled for that Tuesday?

A. Uh-huh. Well, actually, the first flight, it was Monday, and I didn't get to go back to the island. My original—the one I missed, though, was scheduled for—

Q. Tuesday?

A. —was scheduled for Tuesday, and I missed it that afternoon like literally by three minutes and—I had already tipped the guy that had rushed my bags onto the plane, and it took forever to get it rescheduled for that next morning.

Q. And you went back to Victoria's and—

A. Yeah, to a less than friendly environment.

Q. —and stayed there for that night.

A. Because after fixing her stereo, I fell asleep pretty quickly. (Inaudible). But, like I say, (inaudible) my high blood pressure is—keeps you asleep sometimes.

Q. What time did you say you went to bed?

A. Loosely between 10 and 10:30. Probably closer to 10:30.

Q. You said you saw that it was—after you were awakened by Victoria, you had went to get a [222] drink, and you saw that it was still early enough to go talk to Bill?

A. Yeah. It was after—it was right at bar closing, right after bar closing, so I went in and washed my face and, you know, put my clothes on and—I had called him earlier, and he was never around, and so . . . I had—

Q. (22:00:41) You knew that he was going to—that he was probably going to be coming home about that time from the bar as was his usual time?

A. Yes. Yes, his usual—here's—here's the funny thing about it. I bought that six-pack of beer that afternoon when I went by to leave the keys. It was still in the car. I was just taking it to him. And then . . . (22:01:10) Because—stick through the hell (inaudible). And, once again, I think I told you this real early on, but Bill was not always—well, you know, he was not always like this. Sometimes—he wasn't surly always. And the night before, like I said, he was real congenial, and we still had a couple of things to talk about. (Inaudible). I said—I said, you know, if I have time, I'll check in with you tomorrow, and I didn't have time with the [223] flight. I missed that; came back. And I had called him at the house again I guess before I went to Victoria's, too, and he was out and about, so that was pretty right on line. And we sat up a lot of nights, you know, till 2 or 3:00 in the morning, drank and shot the shit, and actually got along fine. Sometimes that was the best time to talk to him.

Q. Uh-huh. You said the door was open. Was it open enough for you to see into the room?

A. Not until I—as I knocked on it.

Q. Okay.

A. And that's why I said I didn't really—I kind of like (indicating), and I—"Bill"? "Come on in." And as far as neighbors not hearing the knock, did the neighbors also tell you the television was on about 36 and loud enough to be heard all over the street?

Q. They said that that was so usual that they almost didn't even notice.

A. You could not knock loud enough to be heard over that. That's why—it was. And so often it was because of the stuff that I built. Actually, if he couldn't blow it up . . .

Q. Yeah, they all said that it was a usual [224] thing for the music or the TV or whatever to be blaring.

A. He could actually fall asleep there holding the remote control, clenching it in his hand. And you could go by and manually shut the stuff off and it wouldn't wake him up.

Q. Uh-huh. Did you actually hear him say come in—

A. Yeah.

Q. —or did you understand him?

A. Yeah, I actually did, because I'm used to—I'm used to it. You know, he kind of (indicating). You know, and then it's like he really snapped out of it. And I don't know what he saw, because he wasn't really looking at—have you ever seen somebody awakened and they had just this look in their eyes like—if you're having a really bad nightmare, and you wake up and you're just in stark terror and you don't know why—

Q. Uh-huh.

A. —and he just looked like a—like a—it's that deer in the headlights thing. And I've seen him sit on the couch, jump up, lay back down. I've seen all matter of strange things. I just treated them with whatever—[225] it's somewhere deep down inside of Bill that—man. Not really more

than your average—how do you put it without—that's one reason I told you—I told you the first time, I said, you know, he didn't necessarily have to be drunk to be that unconscious or—he just—I don't even know why I was trying—what I'm trying to make a point, but he—he was very volatile.

Q. Uh-huh.

A. And other times he was a total sweetheart.

Q. (22:07:12) The lamp hit you in the left shoulder you said?

A. Uh-huh. I was approaching from the door. I mean, he—when he jumped up, he—he was actually literally—it was more than just like coming at me. It was staggering back and forth, and I—I'm going to tell you now, we both—I broke—the time that I had the P.I. deal when I was arrested when I hadn't had a single drink, I came home that morning at 7 a.m. and hit that same thing on the couch and broke two toes—

Q. Uh-huh.

A. —by not seeing it.

Q. Uh-huh.

A. And so—and hit my head at the same time. [226] This is not a vindication of anything.

Q. Right.

A. I'm just saying that this is—I'm looking back at that furniture. I don't know what's left of it. But if there's anything left of it, you would find a print of one leg in the middle that sticks out about three inches over the others. And I know that when I jumped back, I know I hit the edge of that table, and—I mean, it moves. The carpet slides. It's very heavy, heavyweight and . . . (Inaudible) changes, the fact I should have gone ahead and called EMS. No matter what he was saying, no matter what he was doing, he's right. We actually virtually argued over whether to call EMS. We actually virtually argued over whether to call EMS.

Q. (22:12:03) So after—okay. When the—when the lamp hit you and the bowl broke, you gave Bill a—kind of lowered

your shoulder and gave Bill a body block and knocked him down onto the coffee table?

A. He kind of had—he kind of had momentum of his own already, but I—yes.

Q. Okay. And—

A. He kind of fell—kind of like—

[227] Q. He hit the table and then he fell to the floor?

A. And under it as well.

Q. Okay.

A. And it was like he was stuck.

Q. Uh-huh.

A. And—and he just kind of went nuts for a minute or two.

Q. Okay.

A. And then he got back up, and I actually—I actually tried to approach him, Hey, man, you know. And I don't even know what I said. It was basically just, you know, get a grip. It's like he wasn't—it wasn't—it was like he wasn't—it was like it wasn't me he was looking at.

Q. Go ahead. What were you going to say?

A. I went to leave, and I got about barely around the corner, and I realized that I—I didn't know what condition I left his truck in, and I went back and locked it.

Q. You locked—

A. —the door. I actually came back and locked the truck door.

Q. The truck door wasn't locked, when we found it.

[228] A. It wasn't? I tried.

Q. (22:15:49) Did you take anything out of his truck?

A. No. He normally had his computer and stuff like that, business papers. That's why I came back, because—because I . . .

Q. So when you was walking out the—the last time you saw Bill, he was kind of halfway standing and halfway kneeling on the floor?

A. It was more standing. He was on his feet. He wasn't kneeling at that point. He was up—I mean, he was up enough to be belligerently telling me he would take care of it. And I said, Bill, man, we need to call EMS; we need to call EMS. And he—he just told me to get out. He said, I'll take care of it. That's kind of—I got the get out part, but the I'll take care of it, whenever he got mad, talking about anything, he would, you know—if you offered to help him with anything, it was like I'll take care of it. But it wasn't—it was definitely—it was screamed. It was—and at the same time the damn TV was louder than hell and . . .

Q. At what point did you get his car keys?

A. On the way out.

Q. Where were they?

[229] A. They were laying on the floor by the door. Just like he came in and tossed them down.

Q. You just happened to see them there?

A. Yeah. I was just basically being—sort of hurrying towards the door, and he's saying he'll take care of it, and I'm going, but he—he's not—he—he's a mess.

Q. Uh-huh.

A. And there—there's a—there's a little entryway where—you know, where there's not—there's no carpet—

Q. Uh-huh.

A. —and things like that stand out like a sore thumb. It wasn't unusual for Bill to leave a trail of watches. He would take off his watch, a sock, a shoe, drop his—he lost his keys about every third day.

Q. Did you go straight back to Victoria's?

A. Yes, I did.

Q. (22:21:22) There's not any more of his checks outstanding?

A. None.

Q. Okay.

A. We had—we had—those—that was quite a while back. We had an ASAP agreement on it, and we [230] were vir-

tually paid off, and we had some other business going on between us.

Q. Uh-huh.

A. Like I said, we were really at least pretty amicable the last few weeks, and just the fact that, you know—and see, I spent two days before I left cleaning up that carport and getting all the paint off the floor and . . .

Q. Had you moved all your stuff out by then?

A. No.

Q. I mean, from the carport?

A. No. I had—

Q. All the paint thinners and stuff like that?

A. They were all in the garbage, and they were—they were taken out on Monday in our garbage thing. But Bill had a ton of shit of his own. Like I said, he was a big—he was a tool man. He had a big long (inaudible) thing. He kept varieties of cleaning agents and stuff like that and, you know, a lot of things I didn't know about that were automotive stuff. I'm not an auto mechanic. Stuff. And, plus, it was an old house. It's like the week before the hot water heater sprung a—a gas leak, and both of us woke up with headaches from it.

[231] Q. Uh-huh. Okay. And you told me the whole truth about the fire, and you don't know anything about the fire?

A. No, sir, I do not.

Q. Okay. I thought of something a while ago that I didn't tell you before. The knobs on the stove, the kitchen stove—remember I asked you if the stove worked?

A. Uh-huh.

Q. Two of the knobs on the kitchen stove were turned to the on position. Gas was still coming out. It wasn't coming out then. Obviously, the fire department turned off the gas, or the gas would have been coming out had the gas been turned on.

A. The point that I came in the house, I didn't smell it. I have come home before—

Q. Uh-huh.

A. —like I said. Bill would leave a burner on or—

Q. You didn't turn the burners on?

A. No.

Q. Okay.

A. No. And I've—he's done that before, but it's like—and then—because they don't have pilot lights, you sometimes just forget to light [232] them. Or in Bill's case, sometimes he would go to cook something and forget to cook it, and you would see him light the fire, and it would just be sitting there burning.

Q. Okay.

A. If gas was still coming out, it looks like that would have—I don't know.

Q. You'll have to talk about the fire stuff with the fire department, because I—

A. Yeah, I can't even—I can't even speculate. I can tell you about electricity. I can't tell you—I can tell you anything you need to know about electricity, but I can't tell you anything about—

Q. —anything about gas or fire.

A. Well—

Q. I mean, if you put the two together, you're going to get a big boom.

A. I know natural gas will give you a really terrible headache—

Q. Uh-huh.

A. —and make you feel like you've got the flu. Also, I know it will blow up if there's enough of it, but it takes quite a lot. And Bill's house, he had—at least one window was broken out in the [233] back anyway, and we had a—we had a poster over it. It would almost be impossible to—you know, to be completely unventilated, because that was a—on the kitchen door back there, there was one pane of glass that was broken that we suspected some neighborhood kids did it one time and—when we had a Roadhouse monthly search dinner over it (indistinguishable).

Q. Uh-huh. Okay. Let me go print this up, let you read it, make sure that's what you want to say. We're pretty close to being done. I'll be right back.

(Brief Recess)

Q. (By Mr. Gilcrest) (22:48:31) I want you to read this. This is obviously not word for word as you were talking to me, because I can't type that fast. I'm not a dictator. So it's taken from what you told me. If there's anything in here that is not true or not correct or I put it down wrong, tell me and we'll change it, okay? Read it from the very top, okay?

A. Do you see one thing? I called him Bill more often than I called him Cato. That was an occasional . . .

[234] Q. Okay. Well—

A. When I was around people that called him Cato, I called him Cato. When I was around people that called him Bill, I called him Bill.

Q. And I changed it about halfway through and started calling him Bill also, as you did. Did you start from the top?

A. Uh-huh.

Q. Okay. You read all these warnings?

A. Uh-huh.

Q. The same thing I told you before?

A. Uh-huh.

Q. All right. Don't (inaudible) me off for spelling or anything. Is there something there you don't understand?

A. No.

Q. Okay.

A. It's quite all right.

Q. Okay.

(Brief Interruption)

UNIDENTIFIED SPEAKER: Yeah. As soon as he gets through reading that—

MR. GILCREST: Okay.

UNIDENTIFIED SPEAKER: —just give me [235] a holler.

MR. GILCREST: Thank you.

THE WITNESS: I lowered the my shoulder.

MR. GILCREST: I think you told me that.

THE WITNESS: I lowered the my.

MR. GILCREST: Oh, is it a typographical error?

THE WITNESS: When that happened, I lowered the my.

MR. GILCREST: The my.

THE WITNESS: I lowered my shoulder.

MR. GILCREST: Yeah, let me just put a line through that. There we go.

THE WITNESS: You know, I know this sounds like a chicken shit thing to say, but I didn't go over there intending to harm Bill. I didn't go over there intending to body block either.

MR. GILCREST: Okay.

THE WITNESS: He literally just kind of exploded and came at me. I think that I—that I did not go there probably—not intending to harm Bill probably expresses that enough. Yeah.

MR. GILCREST: Okay.

[236] THE WITNESS: But it was—it was—this is a shitty word. It was actually a self-protection thing almost, and it was also a reflex.

MR. GILCREST: Okay.

THE WITNESS: You know, I don't know if that should be on there or not.

MR. GILCREST: It's your statement. You tell me what you want on there.

THE WITNESS: Okay. I wanted to add Bill was acting—and that I didn't go over there intending to harm Bill. And, actually, it was a protective reflex. I don't know how to say that without sounding stupid.

MR. GILCREST: That's the way I'll put it if that's what you want to do.

THE WITNESS: I don't want to say self—well, I do want to say self-defense, but it wasn't like—

MR. GILCREST: Bill was not trying to—to harm you?

THE WITNESS: He was just—he wasn't just—I—and I was not trying to harm him. I was just trying to protect me. You know, I—I never touched him with fists.

[237] MR. GILCREST: Okay.

THE WITNESS: I didn't.

MR. GILCREST: So you want to add at the bottom it was—

THE WITNESS: It was—it was a—

MR. GILCREST: It was a self-protective reflex?

THE WITNESS: Yes. It was a—I don't know. If somebody comes at you, what do you do?

MR. GILCREST: Probably the same thing.

THE WITNESS: And like I say, I have moved the truck before, because he—a lot of times because if you don't, he'll get a spare set of keys and drive anyway.

MR. GILCREST: Okay.

THE WITNESS: I don't know—I don't think that's necessary, but . . .

MR. GILCREST: I'll just add, "I took the keys when I left. I drove Bill's truck down the street and parked it, as I've done before."

THE WITNESS: Yeah, because if you—you know, if—

MR. GILCREST: Is that what you want to say?

[238] THE WITNESS: Not really. I don't know.

MR. GILCREST: Is this okay this way, or do you want to add something?

THE WITNESS: You know, without being—or, he wasn't—he wasn't, I wouldn't imagine, in any shape to be driving. That's just good enough. I mean, just so he would not get in it and drive it. Potentially that's what it is. But he—if I took his keys, it wouldn't do any good.

MR. GILCREST: Okay. Let me go—let me go add this part here and get this "the" out—

THE WITNESS: Okay.

MR. GILCREST: —on this page. While I'm doing that, Texas rules say that I have to have two non-police witnesses to do this. They're not in here to talk to you or, anything else. They're just going to witness you sign this statement, okay? You can do that on these two pages, and I'll go change this, okay?

THE WITNESS: All right.

MR. ROACH: Jane, Allen, why don't you come on in. You just have to witness him sign this.

FEMALE SPEAKER: Okay.

MR. ROACH: I need you to go ahead and [239] sign it right there and there. That's where it says person making the statement. I need you to sign your name there and there.

FEMALE SPEAKER: Okay.

MR. ROACH: And all you're signing is that you witnessed Bill sign his name on these pages, and I believe the detective is going to make some revisions on that other page, so we can sign that, so I need you two just to stand by, and hopefully in no longer than 45 seconds you can get back to work.

THE WITNESS: It was just a typo, and then I just wanted to add one thing.

MR. ROACH: I understand. You got a right to read it and make whatever changes you feel need to be made.

THE WITNESS: He did a pretty good job.

FEMALE SPEAKER: Okay. Sign one more place, then.

MR. ROACH: Well, if you'll hold tight.

THE WITNESS: I think he had like three words on the end and changed one word on one line. (22:57:59) He had to change one word on one line.

FEMALE SPEAKER: Okay.

[240] MR. REED: And then get it printed out on the printer.

FEMALE WITNESS: Okay.

MR. REED: Do you—you want anything more?

THE WITNESS: I could use something, I guess. I'm—I didn't eat tonight. I flew—I came straight here from New York. Then we had a meeting. So I guess could I have a Coke or something?

MR. REED: Is that what—you want a Coke or coffee?

THE WITNESS: No coffee.

MR. REED: No coffee.

THE WITNESS: I have high blood pressure. I don't even need the Coke actually, but I need some kind of sugar or something at this point, so . . .

MR. REED: Well, do you want a candy bar instead?

THE WITNESS: And some water maybe. Would that be possible?

MR. REED: Water and a candy bar.

THE WITNESS: Thank you.

MR. REED: All right. Because it [241] didn't sound like you wanted a Coke really that much.

THE WITNESS: (Inaudible) and since I'm not going to be allowed to take my normal medication tonight since I don't have it with me, you know.

MR. REED: Right. Why don't we finish this up here, and I'll go out there since he's not in the room.

THE WITNESS: Okay.

MR. REED: All right?

THE WITNESS: Fine. You guys have been great. Thanks.

MR. REED: No problem.

THE WITNESS: Just, you know, it's a weird feeling, but it feels good—

MR. REED: Getting it off your chest?

THE WITNESS: (Nods affirmatively).

MR. REED: I know the feeling well getting things off my chest.

THE WITNESS: I mean, I never meant to hurt this guy. I went over there to take him a six-pack of beer and just part company, because we already had actually. We just never got to sit and talk about a couple of things. Just can't. (Inaudible).

MR. GILCREST: (23:00:01) Okay. Just [242] look it over and I added this that we added here and took out the

goof that I made at the top, and that's all the changes I made. Can I get one of you-all to—

THE WITNESS: I didn't realize this was the word I used.

MR. GILCREST: Did I make another goof?

THE WITNESS: No. I—I might have done it, but . . .

MR. GILCREST: Just put the date and time below the signatures.

THE WITNESS: (23:00:36) (Inaudible) is a little—that's probably a weak word.

MR. GILCREST: Somewhat.

THE WITNESS: Yeah.

MR. GILCREST: He was out of control.

THE WITNESS: Yeah. He—I don't know if that should be—do you think I should change that, because he was?

MR. GILCREST: Don't ask me what I think. It's your statement, okay? If you want me to scratch it out, we'll just put a line through it, and let you initial it and just scratch out that word.

THE WITNESS: Yeah.

[243] MR. GILCREST: Okay.

THE WITNESS: Yeah, that's fine. That would work. Thank you.

MR. GILCREST: No problem.

THE WITNESS: I missed dinner—lunch today getting here on time. And I—

MR. GILCREST: Yeah, I know. I know. You had to buy a train ticket and everything.

THE WITNESS: Well, I don't—

MR. GILCREST: What I want you to do is while these folks are watching, I want you to initial out beside this line for this scratch out.

THE WITNESS: Okay.

MR. GILCREST: And then just go ahead and sign. This one is trash. Well, you signed in my spot.

THE WITNESS: Oh, I'm sorry.

MR. GILCREST: But that's okay.

THE WITNESS: I'm sorry.

MR. GILCREST: Because, see, I had already signed it on those others. Now, put your initials right there. See, we both made a goof.

THE WITNESS: (Complies.)

MR. GILCREST: There we go. Okay.

[244] FEMALE WITNESS: Okay. Now, do I put the date and time down at the bottom here.

MR. GILCREST: Please do.

FEMALE WITNESS: It's a good thing I could remember today's date.

MR. REED: It's two days from Halloween. How could you forget?

FEMALE WITNESS: Well, you know how I remembered? Yesterday, as I was going to the store, I thought . . .

MR. REED: Thanks, guys.

MR. GILCREST: Thank you-all very much. Okay. Enjoy your candy bar and water there, and I'm going to go take care of a little business, and we'll be back with you and get you—get you put up for the night.

THE WITNESS: Okay.

MR. GILCREST: Okay? All right.

THE WITNESS: Listen, man, thank you.

MR. GILCREST: Okay. Well, you know, good luck to you. We'll be talking with you some more, okay? They're going to take a picture of you here just for file purposes.

[245] MR. REED: Bill, I'm Detective Reed with Montgomery County Police, okay? I'm going to process you on fugitive injustice charges, okay? Those credit card warrants, okay? So we've got to do some processing work. What I want to do now is just take some Polaroid pictures of you.

THE WITNESS: Okay.

MR. REED: Okay? Why don't you—

THE WITNESS: Okay. It doesn't matter. If you want to go ahead and take the pictures first, I'll—

MR. REED: Huh?

THE WITNESS: If you want to go ahead and take the pictures first.

MR. REED: Okay. Fine. Why don't you stand right there. We'll take a number of them, so just. Okay. Why don't you do me a favor. Put your glasses back on. Just look straight ahead.

THE WITNESS: I think I'm kind of swaying a little bit.

MR. REED: That's okay. Just look straight ahead.

THE WITNESS: These are just reading glasses. I hardly ever have them on unless I can't [246] read.

MR. REED: I normally don't use this camera, because it's not working too well. Why don't you stand over here so I can get some faraway shots of you. Dang. I think they need to give me another one. I want you to put your glasses back on. I think that's it. Thank you. You can go ahead and have a seat. You good to go? You okay now?

THE WITNESS: Helped a lot. Thank you

MR. REED: All right. Why don't we get this out of the way. Go ahead and finish that while I—I've got to do one other thing.

(Videotape Concluded)